

The Honorable MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SHAWN MURINKO and DISABILITY  
RIGHTS WASHINGTON, a nonprofit  
membership organization for the federally  
mandated Protection and Advocacy Systems,

Plaintiffs

v.

CHERYL STRANGE, in her official capacity as  
Secretary of the Washington State Department of  
Social and Health Services, and SUSAN BIRCH,  
in her official capacity as Director of the  
Washington State Health Care Authority,

Defendants

NO. 19-cv-00943-MJP

FIRST AMENDED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

**I. OVERVIEW**

1. Plaintiff Shawn Murinko was separated from his wife, his two daughters, his home, his job, and his community for more than six months because Defendants failed to provide him necessary services to enable him to return home. Despite having no medical reason to be hospitalized since December 8, 2018, Mr. Murinko was forced to reside at Harborview Medical Center because Defendants did not provide him with residential habilitation services for which he is eligible that would enable him to return to his life. Although he has since been able to

1 return home, Defendants' policies and practices leave him at imminent and serious risk of  
2 unnecessary hospitalization and institutionalization.

3         2. Plaintiff Murinko is an adult with developmental disabilities who has intensive  
4 needs for long-term supports and habilitative services and has no desire to receive these services  
5 in an institutional setting. He has been determined eligible to receive residential and habilitative  
6 support services in the community. But due to Defendants' failure to ensure such services are  
7 available, Plaintiff lost support services when he was hospitalized for an injury and the  
8 Defendants were unable to replace these necessary services. He was unable to discharge from the  
9 Harborview Medical Center ("Harborview") for nearly eight months longer than necessary  
10 because the Defendants failed to provide the necessary services. Now, because Plaintiff is still  
11 not receiving the same type and level of services he needs and had been receiving, and because  
12 any future injuries would likely lead him to again lose his services and be stranded in a hospital,  
13 he is at continued risk of being re-hospitalized where he again would be indefinitely separated  
14 from his family and community. As a result, Plaintiff is at risk of suffering unnecessary  
15 institutionalization and segregation.

16         3. Plaintiff Disability Rights Washington (DRW) brings this case as an associational  
17 plaintiff on behalf of its constituents, which includes Plaintiff Murinko and other people with  
18 developmental and intellectual disabilities and related conditions who need the type of  
19 community-based residential habilitation services that Plaintiff Murinko needs and lost.

20         4. The Defendants and their agencies, the Department of Social and Health Services  
21 (DSHS) and the Health Care Authority (HCA), are responsible for providing Plaintiff Murinko  
22 and other qualified individuals with intellectual disabilities and related conditions with Medicaid  
23

1 services to ensure their health and welfare with reasonable promptness and in the most integrated  
2 setting appropriate to their needs.

3         5.         Despite assessing Plaintiff Murinko to be eligible for and authorizing residential  
4 support services, Defendants have no plan to ensure that Plaintiff will actually receive these  
5 services and avoid unnecessary institutionalization and segregation. Defendants are failing to  
6 meet his health and welfare needs, provide him services with reasonable promptness, or furnish  
7 reasonable modifications to its service models to prevent him from being placed in a facility  
8 where he would be unnecessarily segregated from his community and family. According to a  
9 recent report by the Office of Developmental Disabilities Ombuds (ODDO) and based upon  
10 information and belief formed by investigation of counsel, many other DRW constituents are  
11 being stranded in inappropriate settings such as acute hospitals due to the Defendants' failure to  
12 provide them with community-based services necessary for discharge. This failure violates their  
13 rights under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*,  
14 Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794 *et seq.*, the  
15 United States Supreme Court's landmark decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), and  
16 the Social Security Act, 42 U.S.C. § 1396 *et seq.*

17         6.         This litigation seeks injunctive and declaratory relief to require Defendants to  
18 provide community-based integrated placement for Mr. Murinko and others in order to avoid  
19 institutionalization, segregation, or discharge without appropriate supports. Without injunctive  
20 and declaratory relief, Mr. Murinko and others will continue to suffer, by being either  
21 unnecessarily hospitalized, unnecessarily institutionalized or segregated, or at risk of serious  
22 injury or death if they are discharged to homes without adequate services.

## II. PARTIES

7. ***Plaintiff Shawn Murinko.*** Mr. Murinko is a Medicaid beneficiary who previously received 24/7 residential habilitative services as a Medicaid Core waiver participant through DSHS's Developmental Disabilities Administration (DDA). Unfortunately, Mr. Murinko suffered an accident on Halloween night of 2018 that caused him to be hospitalized for two broken legs. Although he had been ready for discharge since December 8, 2018, he remained hospitalized until June 28, 2019. Defendants have still not provided him with the Core waiver funded Medicaid services to which he is entitled and needs.

8. ***Plaintiff Disability Rights Washington.*** Plaintiff Disability Rights Washington (DRW), a nonprofit corporation duly organized under the laws of the State of Washington, is the statewide protection and advocacy system designated by the Governor of the State of Washington to protect and advocate for the legal and civil rights of those residents of this state who have disabilities, pursuant to the Developmental Disabilities (DD) Act, 42 U.S.C. §§ 15041-45, the Protection and Advocacy of Individuals with Mental Illness (PAIMI) Act, 42 U.S.C. §§ 10801-51 and RCW 71A.10.080(2). DRW is governed by a board of directors comprised predominantly of people with disabilities and their family members. This board is advised by two advisory councils, the Disability Advisory Council and the statutorily mandated Mental Health Advisory Council, also primarily comprised of people with disabilities and their family members. DRW's constituents include people with disabilities across Washington, including, but not limited to, Plaintiff Murinko and other Washington residents with developmental and intellectual disabilities and related conditions.

9. ***Defendant Cheryl Strange.*** Defendant Cheryl Strange is the Secretary of DSHS, the state agency that includes the Developmental Disabilities Administration (DDA). DSHS,

1 through DDA, is responsible for implementing the Home and Community-Based services  
 2 authorized under the Medicaid Act for individuals with developmental disabilities. Ms. Strange  
 3 is sued in her official capacity only. All alleged acts by Ms. Strange, DSHS, and the  
 4 Developmental Disabilities Administration were taken under color of state law.

5 10. ***Defendant Susan Birch.*** Defendant Susan Birch is the Director of the  
 6 Washington State Healthcare Authority (HCA). The HCA is the designated single state agency  
 7 for Washington's Medicaid programs. Ms. Birch is responsible for ensuring that the Medicaid  
 8 program is administered in a manner consistent with all state and federal laws. Ms. Birch is sued  
 9 in her official capacity only. All alleged acts by Ms. Birch and the HCA were taken under color  
 10 of state law.

### 11 III. JURISDICTION AND VENUE

12 11. Jurisdiction of this Court arises under 28 U.S.C. § 1331 because this action arises  
 13 under the laws of the United States, and 28 U.S.C. § 1343(3) and (4), which confer on the federal  
 14 district courts original jurisdiction over all claims asserted pursuant to 42 U.S.C. § 1983 to  
 15 redress deprivations of rights, privileges or immunities guaranteed by Acts of Congress and the  
 16 United States Constitution.

17 12. Venue is proper pursuant to 28 U.S.C. § 1391(b). A substantial part of the events  
 18 or omissions giving rise to Plaintiffs' claims occurred in the Western District of  
 19 Washington and Defendants may be found here.

### 20 IV. LEGAL FRAMEWORK

#### 21 A. The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act

22 13. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-  
 23 12134, and the Rehabilitation Act of 1973, 29 U.S.C. § 794, are designed to ensure that

1 individuals with disabilities receive their services in the least restrictive, most integrated setting  
2 appropriate.

3 14. The ADA was enacted in 1990 “to provide a clear and comprehensive national  
4 mandate for the elimination of discrimination against individuals with disabilities[.]” 42 U.S.C. §  
5 12101(b)(1). In enacting the ADA, Congress found that “historically, society has tended to  
6 isolate and segregate individuals with disabilities, and, despite some improvements, such forms  
7 of discrimination against individuals with disabilities continue to be a serious and pervasive  
8 social problem[.]” 42 U.S.C. § 12101(a)(2).

9 15. Congress further recognized that “people with disabilities, as a group, occupy an  
10 inferior status in our society, and are severely disadvantaged socially, vocationally,  
11 economically, and educationally; [and] the Nation’s proper goals regarding individuals with  
12 disabilities are to assure equality of opportunity, full participation, independent living, and  
13 economic self-sufficiency for such individuals[.]” 42 U.S.C. § 12101(a)(6)-(7).

14 16. Title II of the ADA applies to public entities, including state or local governments  
15 and any departments, agencies, or other instrumentalities of state or local governments. 42  
16 U.S.C. §§ 12131, 12132. It provides that “no qualified individual with a disability shall, by  
17 reason of such disability, be excluded from participation in or be denied the benefits of the  
18 services, programs, or activities of a public entity, or be subjected to discrimination by any such  
19 entity.” 42 U.S.C. § 12132.

20 17. Title II’s implementing regulations prohibit public entities from utilizing “criteria  
21 or methods of administration” that “have the effect of subjecting qualified individuals with  
22 disabilities to discrimination,” or “[t]hat have the purpose or effect of defeating or substantially  
23

1 impairing accomplishment of the objectives of the public entity's program with respect to  
2 individuals with disabilities[.]” 28 C.F.R. § 35.130(b)(3)(i), (ii).

3 18. The Title II implementing regulation known as the “integration mandate” requires  
4 that public entities “administer services, programs, and activities in the most integrated setting  
5 appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). “The  
6 most integrated setting” is one that “enables individuals with disabilities to interact with  
7 nondisabled persons to the fullest extent possible.” 28 C.F.R. § Pt. 35, App. B.

8 19. The U.S. Supreme Court has held that Title II of the ADA prohibits the  
9 unjustified institutionalization of individuals with disabilities, noting that segregation of people  
10 with disabilities “perpetuates unwarranted assumptions that persons so isolated are incapable or  
11 unworthy of participating in community life,” and “severely diminishes the everyday life  
12 activities of individuals, including family relations, social contacts, work options, [and]  
13 economic independence.” *Olmstead v. L.C.*, 527 U.S. 581, 597-600 (1999).

14 20. According to case law and the Statement of the Department of Justice on  
15 Enforcement of the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, the ability  
16 to state a claim under Title II of the ADA and *Olmstead* is not limited to people currently in  
17 institutional or other segregated settings, but applies equally to those at serious risk of  
18 institutionalization or segregation (*e.g.*, if a public entity's failure to provide community services  
19 “will likely cause a decline in health, safety, or welfare that would lead to the individual's  
20 eventual placement in an institution”). *Available at*  
21 [http://www.ada.gov/olmstead/q&a\\_olmstead.htm](http://www.ada.gov/olmstead/q&a_olmstead.htm). As a result, “[i]ndividuals need not wait until  
22 the harm of institutionalization or segregation occurs or is imminent” before they may state a  
23 claim for illegal discrimination. *Id.*

21. Title II implementing regulations require a public entity to make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 35 C.F.R. § 35.130(b)(7)(i).

22. Like the ADA, the Rehabilitation Act prohibits discrimination against people with disabilities under any program or activity that receives federal financial assistance. 29 U.S.C. § 794(a). The Rehabilitation Act’s implementing regulations prohibit recipients of federal financial assistance from utilizing “criteria or methods of administration” that have the effect of subjecting qualified persons with disabilities to discrimination on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient’s program with respect to persons with disabilities. 45 C.F.R. § 41.51(b)(3)(i)-(ii); 45 C.F.R. § 84.4(b)(4)(i)-(ii). These implementing regulations also require entities receiving federal financial assistance to “administer programs and activities in the most integrated setting appropriate to the needs of qualified . . . persons [with disabilities].” 28 C.F.R. § 41.51(d); *see also*, 45 C.F.R. § 84.4(b)(2).

#### **B. Title XIX of the Social Security Act**

23. Having chosen to participate the Medicaid program, the State of Washington is required to operate its Medicaid services in compliance with the Social Security Act, 42 U.S.C. § 1396, and its implementing regulations. Section 1915(c) of the Social Security Act, 42 U.S.C. § 1396n(c), allows states to submit a request to the U.S. Secretary of Health and Human Services (“Secretary”) to “waive” certain federal Medicaid requirements in order to offer a broad range of home and community-based services as an alternative to institutional care in an Intermediate Care Facility (ICF).



24. In order to comply with federal requirements governing Medicaid Home and Community-Based Services (HCBS) waivers for people with intellectual and developmental disabilities, the Defendants must ensure that Medicaid services for which each individual is eligible are provided with reasonable promptness and ensure each participant's health and welfare. 42 U.S.C. § 1396a(a)(8); 42 U.S.C. § 1396n(c)(2)(C). Defendants must also ensure that HCBS Waiver participants have a "person-centered service plan" that "[r]eflect[s] that the setting in which the individual resides is chosen by the individual." 42 C.F.R. § 441.301(c)(2)(i).

## V. BACKGROUND

25. Defendants provide and authorize payment for community-based residential habilitation services for individuals with developmental disabilities in individuals' own homes. Defendants fund community-based residential habilitation services through the Core and Community Protection Waivers, both of which are Home and Community-Based Services (HCBS) Medicaid waivers.

26. Community-based residential habilitation services are typically delivered by privately operated for-profit or non-profit supported living agencies. In addition, residential habilitative services are also delivered through the State Operated Living Alternatives (SOLA) program, which is a supported living program run by DDA.

27. Residential habilitation services provided by private supported living agencies and the SOLA program are a combination of training, personal care, and supervision to address outcomes in several areas of the individual's life, including "personal power and choice," "competence and self-reliance," "positive recognition by self and others," and "positive relationships." These services should be provided in integrated settings and support individuals

1 in opportunities to engage in a variety of community-based activities. 42 C.F.R. §  
2 441.301(c)(2)(i).

3 28. Under the approved Core and Community Protection HCBS waivers, the limit to  
4 the amount, frequency, or duration of residential habilitation services is determined by the  
5 negotiated daily rates, which are “based on residential support levels (assigned by DD[A]  
6 assessment), specific support needs listed in the assessment, support provided by others (e.g.  
7 family members), and the number of people living in the household who can share the support  
8 hours.” Individuals may receive anywhere from a few hours a week (Levels 1-3) to daily  
9 support with intermittent checks through the night (Level 4) to 24/7 onsite support (Levels 5-6).

10 29. When waiver participants are seeking new residential habilitation service  
11 providers, their DDA case managers prepare a “referral packet” with information about their  
12 support needs, history, and preferences. The case managers then submit this referral packet to  
13 DDA resource managers, who send the packets to private supported living agencies that are  
14 certified to deliver community-based residential habilitation services.

15 30. If a supported living agency receiving a referral packet is interested in serving an  
16 individual, the agency can notify DDA to proceed with starting services. DDA permits supported  
17 living agencies to decline referrals or rescind their offers to serve individuals, for any reason.

18 31. Once contracted, DDA permits a supported living agency to also terminate  
19 services if it determines it can no longer meet an individuals’ health and welfare needs. DDA  
20 imposes no obligations on agencies to continue serving a client until a new provider is found.

21 32. If no supported living agency receiving the packet agrees to serve an individual,  
22 DDA may send referral packets to additional agencies, or resend referral packets to the same  
23 agencies.

1           33.     If all private supported living agencies decline DDA's referrals, DDA does not  
2 provide the individual with alternative services that do not require the use of a private agency.  
3 Nor does DDA provide the individual with any notice of their right to a fair hearing to address  
4 DDA's failure to provide services with reasonable promptness or notice of other available  
5 options. Instead, individuals must continue to wait indefinitely for a private supported living  
6 agency willing to provide them with services, which may never occur, entirely defeating the  
7 objective of administering services in the most integrated setting and with reasonable  
8 promptness.

9           34.     In addition to SOLA and certified supported living agencies, residential  
10 habilitation services may be delivered in "companion home" settings. *See* WAC 388-829C. This  
11 model provides for an individual in-home provider and expands the pool of potential providers to  
12 include individuals chosen by the Medicaid waiver participant who can meet the client needs and  
13 meet the requirements in WAC 388-829C-040.

14           35.     Defendants also provide for in-home caregiving services, or personal care  
15 services, to assist individuals in their basic activities of daily living through the Community First  
16 Choice (CFC) program. WAC 388-106-0270. Defendants authorize CFC personal care hours  
17 based on an assessment of needs. Individuals authorized CFC personal care hours may hire  
18 agencies to provide staff to serve as their in-home caregivers. CFC personal care services are not  
19 equivalent to residential habilitation services available through the Core and Community  
20 Protection HCBS waivers.

21           36.     Individuals who need long-term care may also receive facility-based services in  
22 Adult Family Homes or Skilled Nursing Facilities (SNF). Both of these facility-based settings  
23 require individuals to live with other individuals with disabilities needing long-term care

1 services, limit privacy for raising a family or require separation from family, and are more  
 2 segregated than in-home services.

3 37. Under the federal Nursing Home Reform Act's Pre-admission Screening and  
 4 Resident Review (PASRR) requirements, individuals with developmental disabilities may not be  
 5 admitted to a SNF unless the placement is necessary and appropriate to meet their needs. 42  
 6 U.S.C § 1396r(b).

## 7 VI. FACTUAL ALLEGATIONS

### 8 A. Plaintiff Murinko

9 38. Plaintiff Murinko is a Core waiver participant who, until last year, had a  
 10 supported living provider that been delivering 24/7 residential habilitative services to meet his  
 11 health and welfare needs. These services enabled Plaintiff to live in his own home with his wife  
 12 and two children, enjoy a successful career, and live a typical integrated lifestyle.

13 39. On or about October 31, 2018, Plaintiff Murinko suffered broken legs while trick-  
 14 or-treating with his children and was hospitalized at Harborview Medicaid Center (hereinafter  
 15 "Harborview"). Upon Plaintiff's hospitalization, DDA stopped paying his supported living  
 16 provider, who then terminated services. Defendants have not promulgated any rules, contract  
 17 provisions, or policies for preventing waiver service providers from terminating services at will,  
 18 nor has it established any practices to ensure the financial viability of continuing services in the  
 19 event Plaintiff Murinko or other constituents of Plaintiff DRW are hospitalized.

20 40. By December 8, 2018, Plaintiff Murinko recovered from his broken legs to the  
 21 extent that he no longer required inpatient hospitalization. But without a provider to deliver the  
 22 in-home care he had been receiving and continued to need, Plaintiff was unable to timely  
 23

1 discharge and remained essentially trapped at Harborview until July 2019, almost eight months  
2 later.

3 41. On February 1, 2019, DDA assessed Plaintiff Murinko to need 24-hour residential  
4 care, to include full support for hygiene tasks and household tasks, physical support to participate  
5 fully in the community, and full support getting from place to place throughout the community in  
6 order to assure his health and welfare.

7 42. DDA referred Plaintiff Murinko to other supported living agencies but was  
8 unsuccessful in identifying any provider willing and able to offer Plaintiff the services he needs  
9 to safely discharge home. Although DDA provides Core waiver funded residential habilitation  
10 services directly in its State Operated Living Alternatives (SOLA) program, it did not make these  
11 services available to Plaintiff.

12 43. In March 2019, Plaintiff agreed to accept in-home personal care through the CFC  
13 program from a home care agency as an interim solution while DDA searched for a new  
14 residential habilitation provider. However, the home care agency was unsuccessful in recruiting  
15 enough staff to fill the hours of care that Plaintiff would require for a safe discharge.

16 44. On May 1, 2019, Plaintiff Murinko requested a companion home, with  
17 reasonable modifications that would meet the needs DDA assessed Plaintiff to have. Plaintiff  
18 requested an adjustment to the daily rate to provide sufficient compensation for the hours of care  
19 he would need, as well as approval to relax the live-in requirement to allow the provider to live  
20 nearby and available to him as needed. To date, this request has not been granted.

21 45. On May 23, 2019, Harborview informed Plaintiff Murinko that a SNF in  
22 Bremerton had agreed to admit him, although he did not meet the level of care criteria for skilled  
23 nursing. He declined to discharge to a setting that was inappropriate to his needs and where he

1 would be ineligible for the Core waiver, unable to continue his job, and distanced from his wife  
2 and two children who live in Thurston County.

3 46. On June 11, 2019, Harborview issued Plaintiff Murinko a notice that he had not  
4 met inpatient criteria since December 8, 2018, and provided him with a target discharge date of  
5 June 17, 2019. Harborview noted that services to discharge home are not available, but provided  
6 no specific discharge alternatives, except the SNF in Bremerton. Having not received a response  
7 to his request for a modified Companion Home, Plaintiff notified DSHS of his imminent  
8 discharge and requested SOLA services to support him in his home upon discharge.

9 47. On June 14, 2019, during a care conference with Plaintiff Murinko, Harborview  
10 continued to plan for discharge either to a SNF or to Plaintiff's home with CFC personal care  
11 services. However, no SNF was currently available and the home-care agency to provide CFC  
12 personal care services had still not recruited sufficient staff to provide a minimally adequate  
13 amount of in-home care services. That afternoon, DDA requested that Plaintiff sign a consent to  
14 refer him to an Adult Family Home, but did not offer SOLA services or approve his request for a  
15 modified Companion Home.

16 48. On June 28, 2019, Plaintiff Murinko discharged to his home with limited personal  
17 care services funded by Medicaid CFC and another time-limited non-Medicaid source.

18 49. Despite the multiple contracted homecare agencies, Plaintiff Murinko has been  
19 unable to find enough caregivers to provide services for all the hours he has been assessed to  
20 need and authorized to receive. However, he agreed to accept fewer hours of caregiving than he  
21 needs in order to be able to discharge from Harborview and return to his family, home, and job.

22 50. Currently, Plaintiff Murinko's care remains unstable as he has faced shifts where  
23 caregivers have called in sick or had to leave because they were unwell. Furthermore, he has not

1 been able to find any additional agencies or independent providers who can provide staff to work  
2 the remaining hours for which he has been authorized to receive care. With limited personal care  
3 providers to furnish all of the assistance Plaintiff Murinko needs, he is at risk of further injury to  
4 his health and safety.

5 51. Plaintiff Murinko has not received residential habilitation services since October  
6 31, 2018, despite his ongoing need and eligibility for this service under the Core waiver.

7 52. Plaintiff Murinko continues to be at imminent risk of being unnecessarily  
8 segregated in a facility that is not appropriate to his needs, because he was discharged to his  
9 home without appropriate services.

10 **B. Plaintiff DRW**

11 53. As the protection and advocacy system for the State of Washington, Plaintiff  
12 DRW investigates allegations of abuse and neglect, including allegations of inadequate services  
13 and failure to implement care or discharge plans. DRW has received and is responsible for  
14 investigating credible complaints about other constituents of DRW who are facing fates similar  
15 to those faced by Plaintiff Murinko. Specifically, DRW has continued receiving allegations  
16 regarding its constituents who have lost their Medicaid waiver funded supported living providers  
17 and are now languishing in inappropriate settings, including but not limited to acute hospitals,  
18 without residential habilitation and other Medicaid waiver services necessary to ensure their  
19 health and welfare.

20 54. Last year, DRW attempted to assist one of its constituents with developmental  
21 disabilities who was receiving supported living services from SL Start, a provider who was  
22 decertified for failing to meet state regulatory standards for numerous clients, including this  
23 constituent. After being transferred to Aacres, another supported living provider owned by the

1 same parent company that owned SL Start, Aacres terminated this constituent's services. DRW  
 2 advocated for Defendants to provide its constituent with alternative residential habilitation  
 3 services, but they did not provide her with these necessary services or ensure she would receive  
 4 them from another provider. As a result, she went several weeks with no residential services  
 5 before dying in her apartment. DRW reported to DSHS concerns regarding Defendants' failure  
 6 to ensure adequate supported living services were available to protect this and other constituents'  
 7 health and welfare.

8 55. In December 2018, a report entitled "Stuck in the Hospital"<sup>1</sup> was released by the  
 9 Office of Developmental Disabilities Ombuds (ODDO) to document the problem of many DDA  
 10 clients languishing in hospitals because they had no supported living provider willing to deliver  
 11 services they need to safely discharge. ODDO is housed by Plaintiff DRW and shares  
 12 constituents with Plaintiff DRW, but operates as a private, independent office pursuant to RCW  
 13 43.382.005.

14 56. In "Stuck in the Hospital," ODDO discussed several examples of individuals who  
 15 had lost supported living services that they had been receiving through DDA HCBS waivers. In  
 16 each of these examples, the individuals were waiting in hospitals for residential habilitative  
 17 services because their supported living providers had terminated services and no other provider  
 18 had accepted their referrals. Some of these individuals had behavior support needs and were  
 19 being physically or chemically restrained because they were in an inappropriate environment and  
 20 no longer had the habilitative services to implement positive behavior support plans and other  
 21 skill-based trainings to help them avoid harming themselves or others.

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 23 <sup>1</sup> See <https://ddombuds.org/wp-content/uploads/2018/12/DD-Ombuds-Hospital-Report-12.10.18-Final.pdf> (last  
 visited July 19, 2019)



57. Prior to releasing “Stuck in the Hospital,” ODDO issued another report entitled “Diverting Crisis.”<sup>2</sup> In this May 2018 report, ODDO documented several examples of DDA clients in crisis due to supported living providers refusing or terminating services. Although many examples discussed crises precipitated by the inability of parents and families to continue providing primary supports, the report included one example of an individual who had been in the hospital for over six weeks with no medical need because his residential provider terminated services. By contrast, the report provided an example of one DDA client who was able to access SOLA services. In this case, the individual was able to live in the community with well-trained staff who can support and accommodate his needs.

58. Despite these reports, Defendants have not implemented systemic policy changes to create a “no reject/no eject” solution for clients who have lost or are at risk of losing supported living services. Defendants have not expanded SOLA to be available to community based hospital patients needing supported living services to discharge, nor have they contracted with other supported living providers to ensure services be continuously available to meet individual health and welfare needs.

59. DRW has engaged in advocacy on behalf of people with disabilities for over forty years, and over the past twenty years, DRW has undertaken significant systemic litigation to protect the rights of its constituents with intellectual disabilities and related conditions to ensure they receive individualized and appropriate care in the least restrictive setting appropriate to their needs. Because DRW’s constituency includes Plaintiff Murinko and other DDA waiver participants who need community-based supported living services in order to discharge from

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<sup>2</sup> See <https://ddombuds.org/wp-content/uploads/2018/05/Diverting-Crisis-Final-5.8.18.pdf> (last visited July 19, 2019).

unnecessary hospitalizations and other inappropriate settings, the interests of DRW and the affected individuals in this case are aligned.

## VII. CLAIMS FOR RELIEF

### **FIRST CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT**

60. Plaintiffs re-allege the paragraphs above.

61. Plaintiff Murinko and Plaintiff DRW's constituents are "qualified individuals with a disability" within the meaning of 42 U.S.C. § 12131(2). Although Plaintiff Murinko and Plaintiff DRW's constituents have proven fully capable of living in an integrated setting in the community, Defendants have not consistently provided them the services needed to do so.

62. Defendants have failed to provide Plaintiff Murinko and Plaintiff DRW's constituents community-based services that they need in order to avoid segregation in an institution in violation of Title II of the ADA, 42 U.S.C. § 12132 and its implementing regulations.

63. Defendants' "methods of administration" further have the effect of subjecting Plaintiff Murinko and Plaintiff DRW's constituents to discrimination on the basis of disability by placing them at risk of unnecessary and unjustified segregation, in violation of 28 C.F.R. § 35.130 (b)(3).

64. Pursuant to 42 U.S.C. § 12133 and 42 U.S.C. § 1983, Plaintiffs are entitled to declaratory and injunctive relief as well as reasonable attorneys' fees and costs incurred in bringing this action.

### **SECOND CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF SECTION 504 OF THE REHABILITATION ACT**

65. Plaintiffs re-allege the paragraphs above.

66. Plaintiff Murinko and Plaintiff DRW's constituents are qualified individuals with disabilities under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (a). Defendants' agencies, DSHS and HCA, receive federal financial assistance.

67. Defendants and their agencies violate Section 504 of the Rehabilitation Act and its implementing regulations by denying Plaintiff Murinko and Plaintiff DRW's constituents access to integrated community-based programs appropriate to meet their needs, thereby putting them at risk of institutionalization.

68. Pursuant to 29 U.S.C. § 794 and 42 U.S.C. § 1983, Plaintiffs are entitled to declaratory and injunctive relief as well as reasonable attorneys' fees and costs incurred in bringing this action.

### **THIRD CLAIM: DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATIONS OF TITLE XIX OF THE SOCIAL SECURITY ACT**

69. Plaintiffs re-allege the paragraphs above.

70. Plaintiffs are entitled to declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 that Defendants have acted under color of state law to violate Title XIX of the Social Security Act by failing to provide them with (1) Medicaid benefits with reasonable promptness, 42 U.S.C. § 1396a(a)(8); (a)(10)(A) and its implementing regulations; (2) a meaningful choice of providers, including a choice between institutional and community-based services, 42 U.S.C. § 1396n(c)(2)(B); (C); and (3) necessary safeguards to protect their health and welfare needs, 42 U.S.C. § 1396n(c)(2)(A). Plaintiffs are also entitled to reasonable attorneys' fees and costs incurred in bringing this action.

### **VIII. DEMAND FOR RELIEF**

WHEREFORE, Plaintiffs requests that this Court:

1. Enter judgment in favor of Plaintiffs;

1           2.       Declare that the Defendants' failure to provide community based residential  
2 habilitation services under the Core or Community Protection waivers to Mr. Murinko and  
3 DRW's constituents who need and are eligible for residential habilitation services places them at  
4 risk of unnecessary institutionalization and segregation, and violates the Title II of the ADA,  
5 Section 504 of the Rehabilitation Act, the Medicaid Act.

6           3.       Preliminarily and permanently enjoin Defendants from continued violations of  
7 Title II of the ADA, Section 504 of the Rehabilitation Act, the Medicaid Act, and require  
8 Defendants to ensure that Mr. Murinko and DRW constituents (a) are provided with appropriate,  
9 integrated, community-based residential services with reasonable promptness to ensure their  
10 health and welfare are protected; (b) are discharged from the hospital with adequate home care  
11 supports; and (c) are not discharged to or placed in an inappropriate institutional setting.

12           4.       In order to ensure the above, Plaintiffs ask that the Court issue:

13               a)       An injunction ordering Defendants to, as soon as the Court deems  
14 practicable, assign SOLA staff to Mr. Murinko and other DRW constituents needing  
15 supported living services in order to safely discharge from the hospital, permanently or  
16 until such time that a supported living provider contracts to serve them; or

17               b)       An injunction ordering Defendants to modify their contracts with private  
18 supported living providers to add a "no reject/no eject" provision, so as to ensure that Mr.  
19 Murinko and other DRW constituents needing supported living services in order to safely  
20 discharge from the hospital have continuously available services necessary to meet their  
21 health and welfare needs.

22           5.       Plaintiffs ask that the Court award them attorney fees and costs; and

23           6.       Award such other relief as is just and proper.

1 DATED: August 2, 2019.

2 **DISABILITY RIGHTS WASHINGTON**

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18 Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Nissa Iversen at [Nissal@atg.wa.gov](mailto:Nissal@atg.wa.gov)

Kathryn Krieger at [KathrynK1@atg.wa.gov](mailto:KathrynK1@atg.wa.gov)

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2<sup>nd</sup> day of August 2019, at Seattle, Washington.

  
Mona Rennie, Legal Assistant